

THIRD DIVISION
FEBRUARY 5, 2014

No. 1-12-0519

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 21492
)	
WILFREDO MIRANDA,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

O R D E R

¶ 1 **Held:** Defendant's post-conviction petition was properly dismissed as frivolous and patently without merit where the record contradicted his allegation that he was denied the benefit of his bargain.

¶ 2 Defendant Wilfredo Miranda appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant contends that he set forth the gist of a constitutional claim that he was denied the benefit of his plea bargain when he pled guilty in exchange for a certain sentence, but did not receive the 245 days of presentence custody credit which he claims was part of the agreement. We affirm.

¶ 3 The record shows that in 2004, defendant pled guilty to one count of aggravated battery with a firearm for shooting his girlfriend, Erika Otero, and was sentenced to 10 years' imprisonment (03 CR 23674). In 2008, while still incarcerated on the aggravated battery charge, defendant was arrested after it was alleged that he violated an order of protection entered against him by contacting Otero through the mail.

¶ 4 At a hearing held on May 19, 2009, the State told the trial court that in exchange for defendant pleading guilty to four counts of violating an order of protection, it was recommending concurrent sentences of four years to be served consecutively to the 10-year sentence on his previous aggravated battery with a firearm conviction. The State also requested that an order of protection be in effect for two years after defendant's completed sentence. As part of the agreement, the State indicated that the additional charges against defendant would be *nolle prossed*. The trial court asked defense counsel and defendant if this was their understanding of the plea agreement, and they responded affirmatively. The court then explained that defendant was pleading guilty to Class 4 felonies, he could be sentenced up to six years' imprisonment based on his eligibility for an extended term, fined up to \$25,000, and given a one-year term of mandatory supervised release. The court also admonished defendant of the rights he was waiving by pleading guilty, and defendant acknowledged that he understood. Defendant further stated that he was not threatened or promised anything in exchange for pleading guilty.

¶ 5 After detailing and accepting the factual basis for the plea, the trial court stated that defendant understood the nature of the charges, the possible penalties, his legal rights, and that he had knowingly and voluntarily waived those rights. The court then stated, "[i]t's the sentence of this court as to each of these cases, you will be sentenced to four years in the Illinois

Department of Corrections. These four sentences will run concurrent or together with one another. But they will be consecutive to the sentence that you're serving on 03 CR 23674." The court also entered a preliminary order of protection as outlined during the plea. The original mittimus indicated that defendant was granted 147 days of presentence custody credit, but the trial court subsequently amended it to 245 days of credit.

¶ 6 Although defendant did not file a motion to withdraw his guilty plea and vacate the judgment or otherwise attempt to perfect an appeal from it, in 2011, he filed a *pro se* "motion to amend mittimus to reflect IDOC [Illinois Department of Corrections] policy of aggregating credit." In it, defendant alleged that the Department of Corrections should be instructed to give defendant credit of 245 days against each of his consecutive sentences. The trial denied defendant's motion, finding that granting defendant's request would result in an improper "double credit." On appeal, we affirmed the court's decision after granting the Appellate Defender leave to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Miranda*, 2012 IL App (1st) 111256-U (unpublished summary order under Rule 23).

¶ 7 On November 10, 2011, defendant filed the instant *pro se* post-conviction petition, alleging that his due process rights were violated where the IDOC refused to honor the 245 days of presentencing credit awarded to him by the trial court. In his petition, defendant specifically maintained that he pled guilty to four counts of violating the order of protection, accepting concurrent four-year extended terms of imprisonment, "in exchange for the remaining counts to be nolle prosequi, and for [him] to receive pre-trial credit upon the remaining counts." Defendant attached to his petition the transcripts of the March 19, 2009 hearing, as well as the original and corrected mittimus.

¶ 8 On January 6, 2012, the circuit court summarily dismissed defendant's petition as

frivolous and patently without merit. In doing so, the court held that defendant was not entitled to the relief sought because his claim involved a statutory right and was not of constitutional magnitude where he was requesting sentencing credit. The court also found that his claim was waived because he did not move to withdraw his guilty plea. This appeal followed.

¶ 9 On appeal, defendant acknowledges that he was ineligible for presentence custody credit under Illinois law because he was already serving his prior sentence at the time he was in presentencing custody. Nevertheless, defendant contends that his petition states the gist of a meritorious due process claim because the 245-day presentence custody credit awarded to him by the trial court was part of his plea bargain, and because this credit is unavailable to him, he was denied the benefit of his bargain. As relief, defendant requests, pursuant to *People v. Whitfield*, 217 Ill. 2d 177 (2005), that his prison term be reduced by 245 days. Alternatively, defendant asks that the matter be remanded for second-stage proceedings.

¶ 10 We initially note that the State argues that defendant's claim for presentencing custody credit is statutory in nature and thus not subject to scrutiny under the Act. In so arguing, the State relies on cases where this court has held that issues concerning sentencing credit should not be considered on post-conviction review. See *People v. Reed*, 335 Ill. App. 3d 1038 (2003); *People v. Uran*, 196 Ill. App. 3d 293 (1990). However, as defendant correctly points out in his reply brief, his argument on appeal is that the presentence custody credit at issue was part of the plea agreement, and the fact that the IDOC would not apply this credit to his sentence allegedly denied him the benefit of his bargain. Defendant has thus alleged that his constitutional right to due process was violated, which is a cognizable claim under the Act. See *Whitfield*, 217 Ill. 2d at 189 (stating that a defendant may challenge the constitutionality of his guilty plea by claiming that he did not receive the benefit of the bargain), relying on *Santobello v. New York*, 404 U.S.

257, 262 (1971).

¶ 11 The State also argues that defendant's claim is waived as it could have been brought on direct appeal, but was not. However, defendant explained in his petition that it was not until he learned the IDOC refused to grant him any presentencing custody credit for the case at bar. Therefore, defendant's claim is not considered procedurally defaulted. See *Whitfield*, 217 Ill. 2d at 188 (where the defendant did not learn of his mandatory supervised release term until he arrived at the IDOC, his claim was not procedurally defaulted). We thus turn to the merits of this issue.

¶ 12 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2010). At the first stage of a post-conviction proceeding, the circuit court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Hodges*, 234 Ill. 2d at 11-12; see also *People v. Tate*, 2012 IL 112214, ¶ 9 ("the threshold for survival [is] low"). Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an indisputably meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. We review the summary dismissal of a post-conviction petition *de novo* (*Tate*, at ¶ 10), and may thus affirm on any ground substantiated by the record, regardless of the trial court's reasoning (*People v. Lee*, 344 Ill. App. 3d 851, 853 (2003)).

¶ 13 In the instant case, defendant pled guilty to four counts of violating an order of protection and received four concurrent four-year sentences to be served consecutive to his 10-year sentence on his prior aggravated battery with a firearm conviction. The amended mittimus shows that defendant was also granted 245 days of presentence custody credit. We observe, and both parties correctly agree, that the trial court improperly awarded defendant this sentencing credit where the 245 days were spent in custody on the sentence for his prior conviction. See *People v. Latona*, 184 Ill. 2d 260, 271 (1998) ("to the extent that an offender sentenced to consecutive sentences had been incarcerated prior thereto on more than one offense simultaneously, he should be given credit only once for actual days served"). Based on *Latona*, the court could not, as a matter of law, award defendant 245 days of credit.

¶ 14 Nevertheless, the record shows that the presentence custody credit awarded by the trial court was never part of defendant's plea agreement, and thus defendant's allegation to the contrary is fanciful. At the May 19, 2009 hearing, the only agreement made in relation to defendant's sentence was that the State would recommend four years' imprisonment, extend the order of protection against defendant, and strike the remaining charges in exchange for defendant's guilty plea. In accepting the plea agreement, the court stated, "[i]t's the sentence of this court as to each of these cases, you will be sentenced to four years in the Illinois Department of Corrections. These four sentences will run concurrent or together with one another. But they will be consecutive to the sentence that you're serving on 03 CR 23674." Although the original and amended mittimus indicated that defendant was to receive presentence custody credit, there was no mention of presentence custody credit during the plea negotiations. Furthermore, the record rebuts defendant's assertion that he could have been promised that he would receive credit on his consecutive sentences during prior, off-the-record negotiations. In fact, the record shows

that defendant confirmed at the plea hearing that no other promises were made to him that were not included in the plea agreement recited in court. See *People v. Torres*, 228 Ill. 2d 382, 396-97 (2008) (finding that defendant's acknowledgement at a plea hearing that there were no promises regarding his plea served to contradict allegation in his petition that he pled guilty in reliance upon an alleged, undisclosed promise by his counsel regarding sentencing).

¶ 15 Accordingly, *Whitfield*, 217 Ill. 2d at 201-02, 205, which granted the defendant a reduction in sentence because he received a different, more onerous sentence than the one to which he agreed, has no application here because defendant had no agreement with the State to receive presentence custody credit. We similarly find *People v. Clark*, 2011 IL App (2d) 091116, relied on by defendant, distinguishable from the case at bar. In *Clark*, the defendant's sentence was reduced on appeal because the State represented, in open court, that it had agreed that the defendant was entitled to presentence custody credit, and specifically detailed the amount of credit awarded for each consecutive sentence. *Clark*, at ¶¶ 5-6, 11. Here, the State never made any representations regarding custody credit. Defendant thus received the benefit of his bargain, and he is not entitled to a reduction of his sentence. Consequently, we hold the trial court properly dismissed defendant's post-conviction petition where the allegations in his petition failed to demonstrate the gist of a constitutional claim.

¶ 16 For the foregoing reasons affirm the judgment of the circuit court.

¶ 17 Affirmed.